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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-906

UNITED AIR LINES, INC.,

Petitioner,

vs.

HARRIS S. MCMANN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Brief of Amici Curiae National Retired Teachers Association, American Association of Retired Persons, Legal Services for the Elderly Poor and Gray Panthers.

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Interest of Amici.

This brief amici curiae is filed under Rule 42, the prior consent of the parties having been obtained. See Exhibit "A", attached hereto.

The National Retired Teachers Association and the American Association of Retired Persons are affiliated and jointly administered nonprofit corporations having a combined membership of over 10,000,000 people. The Gray Panthers is a nonprofit corporation having a nationwide membership and devoted to advocacy

on behalf of the elderly with respect to legal and social issues particularly affecting their interests. Legal Services for the Elderly Poor is funded by the Administration on Aging of the Department of Health, Education and Welfare and by the Legal Services Corporation. It has appeared before this Court as co-counsel or as amicus in numerous cases involving issues affecting the elderly, *e.g., Massachusetts Board of Retirement v. Murgia,* ..... U.S. ....., 96 S.Ct. 2562 (1976); *Ortwein v. Schwab,* 410 U.S. 656 (1973); *Allied Chemical Workers v. Pittsburgh Plate Glass,* 404 U.S. 107 (1971); and *Graham v. Richardson,* 403 U.S. 365 (1971).

The above organizations believe, and have repeatedly taken positions in support of, the proposition that stereotyped notions concerning the ability of older workers are wrong. Specifically, the practice of mandatory early retirement is regarded by amici as one of the most pernicious forms of discrimination because of age. While amici believe the existing protections of the federal Age Discrimination in Employment Act are inadequate because of the upper age limit, they also believe that those protections *intended* by the Act must be preserved.

Summary of Argument.

The federal Age Discrimination in Employment Act of 1967 (hereafter the "Act") unequivocally prohibits the use of arbitrary age criteria in employment decisions affecting persons between the ages of 40 and 65; the only exception is the existence of a demonstrable relationship between an arbitrarily selected age and the demands of a particular job. Involuntary retirement before the age of 65 is expressly prohibited, and the employee benefit plan provision, when read within con-

text, provides no support for a different conclusion. The legislative history demonstrates that Congress did not intend by that provision to permit early involuntary retirement. Following the Act's passage, the Secretary of Labor disregarded both the language of the Act and the legislative history and issued an interpretive regulation which construed the Act to permit forced early retirement pursuant to a benefit plan. The ensuing confusion was compounded by the Secretary's change in position and the responsive efforts by three lower courts to achieve formulations of their own, all of which contradicted both the language of the Act and the legislative history. The lower court's decision in the instant case is the first correct analysis of the benefit plan provision in the context of early retirement and thus it should be affirmed.

ARGUMENT.

I.

Facially the Act Prohibits the Use of an Arbitrary Age Criterion for Involuntary Retirement Before the Age of 65.

Section 2 of the Act, 29 U.S.C. §621, sets forth the following statement of congressional findings and purpose:

> ". . . [O]lder workers find themselves disadvantaged in their efforts to retain employment, . . .; the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . .;
>
> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; . . . ." 29 U.S.C. §621(a)(1), (2), and (b).

Implementing that preamble is the following specific measure:

> "It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to *discharge* any individual *or otherwise discriminate* against any individual with respect to his compensation, *terms, conditions,* or privileges of employment, because of such individual's age;
>
> (2) to . . . classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee,* because of such individual's age; . . . ." §4, 29 U.S.C. §623(a) (emphasis added).

Unquestionably, and before turning to the exceptions, the general prohibition against employment discrimination based upon age embraces involuntary retirement before the age of 65 whether with or without a pension. While it might be possible to argue that a distinction exists between a "discharge" (within the meaning of the Act) and a retirement, the latter is certainly embraced within the other language of the prohibition, *i.e.*, ". . . terms, conditions, or privileges of employment . . .; . . . adversely affect his status as an employee. . . ."[1]

The only exception to the Act provides:

> "(f) It shall not be unlawful for an employer . . .
>
> (1) *to take any action otherwise prohibited under subsections (a), (b), (c), or (e)* of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; . . . ." §4(f)(1), 29 U.S.C. §623(f)(1) (emphasis added).

---

[1]In *Zinger v. Blanchette,* 549 F.2d 901 (3rd Cir. 1977), the court concluded: ". . . No statutory provision explicitly prohibits early retirement on pension. . . ." 549 F.2d at 905. How the court could have concluded that involuntary early retirement does not affect an employee's "status as an employee" or constitute a "term" and "condition" of employment is mystifying. Section 15 of the Act, 29 U.S.C. §633a, which protects federal government employees, provides that "[a]ll personnel actions . . . shall be made free from any discrimination based on age." 29 U.S.C. §633a(a), and the authority given the Civil Service Commission to establish reasonable exemptions in the form of maximum age requirements is delimited to the situation where ". . . age is a bona fide occupational qualification. . . ." Since, in general, federal employees are automatically afforded retirement benefits, 5 U.S.C. §8334, it is free from doubt that retirement before the age of 65 with a pension constitutes "discrimination based on age" in the absence of a bona fide occupational qualification exception.

In contrast, the employee benefit plan provision is not, by its terms, an exception:

> "(f) It shall not be unlawful for an employer . . .
> . . .
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; . . . ." §4(f)(2), 29 U.S.C. §623(f)(2).

Notably absent in the latter paragraph, while present in the former, is a recognition that the action condoned would be "otherwise prohibited." If Section (f)(2) were considered alone, the absence of that language, or its equivalent, would not necessarily mean that it does not constitute an exception to the general prohibitions of the Act; however, since such language does appear in another paragraph within the same subsection, those words necessarily become significant as a guide to interpretation. That proposition is reinforced by the absence, in the language of the statute containing the prohibitions, of such words as "except as provided in subparagraph (f)(2)." Thus, if paragraph (2) of subparagraph (f) were construed to allow involuntary retirement before the age of 65, such a construction would bring it into facial contradiction with subparagraph (a), which prohibits the use of age as a criterion for the described personnel actions, including retirement. *See* Note 1, *supra; cf. Peters v. Missouri Pacific Railroad Co.*, 483 F.2d 490 at 492 n. 3 (5th Cir. 1973), *cert. denied*, 414 U.S. 1002 (1973) (retirement plans are "conditions of employment" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h)).

Reconciliation of the benefit plan provision with the language of the Act defining unlawful practices can easily be achieved through a consideration of the Act as a whole. Two key qualifying clauses point the way:

> 1. "which is not a subterfuge to evade the *purposes* of this chapter;" and
> 2. "except that no such employee benefit plan shall excuse the failure to hire *any* individual." (emphasis added).

With respect to the clause quoted first, the *purposes* of the chapter relevant to the present question are:

> ". . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; . . . ." §2(b), 29 U.S.C. §621(b).

It is clear that involuntary retirement before the age of 65 would frustrate both of those stated purposes. Involuntary retirement is an employment practice triggered solely by age and is a mechanism by which the employer abdicates any evaluation of skills and abilities. Hence age then becomes an "arbitrary" factor used to frustrate employment based upon ability.[2]

With respect to the second qualifying clause quoted above, according to its language if an employee were

---

[2]Section 4(f)(2) also permits employers "to observe the terms of a bona fide seniority system. . . ." That language further underscores the fact that §4(f)(2) is not, on its face, an exception to the Act. Because promotions, layoffs and pay raises under seniority systems depend solely upon length of service, age is a neutral factor in such employment practices.

involuntarily retired before the age of 65, he could reapply for his job as a presumptively qualified individual and be surrounded by the protections of the Act. *McMann v. United Air Lines, Inc.*, 542 F.2d 217 at 220. In *Hodgson v. American Hardware Mutual Insurance Co.*, 329 F.Supp. 225 (D. Minn. 1971), the court correctly observed:

> ". . . [C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old. . . ." 329 F.Supp. at 229.

The court in *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), while construing the benefit plan provision to permit involuntary retirement before the age of 65, was cognizant of the strange practical effect of its decision:

> ". . . Logically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before 65 may not be discriminated against in applying for employment at another company. . . ." 549 F.2d at 909.

Since ". . . [t]here is a presumption against a construction which would render a statute ineffective or inefficient . . .," *Bird v. United States,* 187 U.S. 118 at 124 (1902), the question arises whether one exists which both harmonizes the expressed purpose of the Act with all the language of the benefit plan provision and gives content to the latter. One does, indeed, exist; it requires an appreciation of the obvious fact that employers are prohibited by the Act from engaging in two distinct forms of discrimination, one

of which is concerned with employment as a *status,* the other with the *circumstances* incident to that status. Age-based personnel actions which determine the existence or nonexistence of a job are far more critical than the allocation of fringe benefits under employee benefit plans. While fringe benefits are important, they are qualitatively distinguishable from employment *per se* with its accompanying social, psychological, and emotional rewards.[3] Construing the benefit plan provision to permit age-based classifications only with respect to fringe benefits, when economically justified, reconciles all of the Act's language. It fosters the articulated congressional aim "to promote employment of older persons based on their ability rather than age;" and the "subterfuge" language in §4(f)(2) gives meaning to the second stated purpose, *i.e.,* to prohibit *arbitrary* age discrimination in employment. If economic considerations justify reduced or no fringe benefits to

---

[3]". . . Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

"There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms." *See Retirement, a Medical Philosophy and Approach,* AMA Committee on Aging, pages 6, 7 (Exhibit B).

a newly-hired elderly worker the employer can "observe the terms" of the benefit plan without being guilty of "arbitrary age discrimination." For example, if an employer provides a combination health, disability, and life insurance package for its employees and if the contribution provided for by the plan, whether negotiated or not, would not provide coverage for a recently-hired older employee, the employer would not be required to assume a larger economic burden. Likewise, if a pension plan required a given number of years of credited service as an eligibility condition, a newly-hired older worker, with no chance of earning the required credited service, could be excluded from the plan or, perhaps, be included with reduced benefits. Conversely, if deviation from the literal terms of a fringe benefit plan could be accomplished to include a newly-hired older worker without imposing a disproportionate burden upon the employer, the failure to do so would be "arbitrary age discrimination" and the plan would be "a subterfuge to evade the purposes" of the Act.[4]

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[4]See Letter to Prentice-Hall from Warren D. Landis, Acting Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, dated March 2, 1977 which states in part:

> "In * * * [a] letter dated December 31, 1968, * * * [Prentice-Hall] inquired whether employees who were hired while in the 40 to 65 year old age group protected by the Age Discrimination in Employment Act could be lawfully excluded from participation in their employer's pension or retirement plan. . . .
>
> "In our response dated February 9, 1970, we stated that at that time we were not prepared to conclude that the exclusion of newly hired older employees from pension or retirement plans would violate the Act. . . .
>
> "Since that time we have taken positions with respect to many specific plans and it is the purpose of this letter to set forth in one document a current and more detailed response to * * * [Prentice-Hall's] original question. The pertinent statutory language is set forth in Section 4(f)(2) of the Act (29 U.S.C. 623(f)(2)), which provides in pertinent part that:
>
> 4(f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * *
>
> (2) to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual
>
> * * *
>
> "As is apparent from this language, an employer must demonstrate that the exclusion of any employees protected by the Act from an employer's pension or retirement plan is not a subterfuge to evade the purposes of the act. In other words, the exclusion must be clearly based on nonage factors:
>
> "Thus, where a pension plan provide (sic) for a defined benefit, such as a flat dollar amount per month after retirement or an amount determined by a formula based on salary and years of service, Section 4(f)(2) may justify the exclusion of an older worker hired when he or she is less than five years from the plan's stated 'normal retirement age'. The employer, in our view, would be able in such a case to demonstrate that the plan provision authorizing the exclusion is not a subterfuge to evade the purposes of the Act, since the substantial cost of funding a specific level of benefits in a relatively short period of time would be the reason for the exclusion. In other words, the employer could prove that cost, rather than age, explains the otherwise discriminatory practice. Under these circumstances, we would not assert any violation, provided that the other tests of the exception were met.
>
> "This assumption of legality would not apply to a provision which excluded employees from a defined benefit plan who were hired when they were more than five years from normal retirement age and, in those cases, the employer, in order to qualify for the exception, would have to demonstrate that the longer exclusionary period was based on *substantial* cost considerations.
>
> "Similarly, where a retirement plan is funded by defined contributions, as in a money purchase or deferred profit-sharing plan, the age of an employee when hired makes no difference in the employer's contributions. In a defined

(This footnote is continued on next page)

In short, the only possible interpretation of the benefit plan provision which harmonizes the language of the

Act is that it refers only to the granting or withholding of fringe benefits and not to personnel actions affecting the existence or non-existence of employment before the age of 65.[5] The interpretation suggested

contribution plan, the employer does not have to fund for a specific level of benefits, and the benefit received by an employee at retirement equals only the value of the contributions made on his behalf. Thus, neither actuarial considerations nor age affect the level of an employer's contributions. Accordingly, we would consider the exclusion of a newly hired older worker from a defined contribution plan to be a violation of the ADEA that is not excused under Section 4(f)(2)." 3 Prentice-Hall, *Pension and Profit Sharing* ¶120,905.

[5]*Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), deserves another parenthetical comment at this point. Section 5 of the Act, 29 U.S.C. §624, directs the Secretary of Labor ". . . to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress." The court in *Zinger* imported the following meaning to that section:

> "The fact that legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. . . ." 549 F.2d at 909.

That observation will be refuted by an examination of the legislative history, but it is believed appropriate to make a comment based upon the face of the statute. In the first place, the court in *Zinger* reasoned from an erroneous premise, *i.e.,* that "compensated involuntary retirement" is outside the scope of the Act. *See* n. 1, *supra.* Secondly, it could be just as easily posited that the Act forbade involuntary retirement before the age of 65 and that Congress desired further data to determine if involuntary retirement at a later age should likewise be prohibited. While Section 3(b) of the Act, 29 U.S. §622(b), requires, within six months following the effective date of the Act, a report from the Secretary concerning the lower and upper age limits, and Section 13, 29 U.S.C. §632, requires annual appraisals thereof, those provisions do not render Section 5 superfluous (given the suggested interpretation) because the latter sections perform different functions. Sections 3 and 13 relate to the lower, as well as upper age limits; and they encompass all forms of age discrimination forbidden by the Act. Section 5, on the other hand, requires a more thorough study and relates to only one form of age-based discrimination.

by the petitioner comports with neither the text chosen by Congress, logic nor common sense; as will be shown below it certainly does not comport with recorded legislative intent.

II.

Legislative History Conclusively Proves That the Benefit Plan Provision Was Never Intended to Permit Involuntary Retirement Because of Age Before the Age of 65.

In the preceding section your *amici* demonstrated that the lower court's decision was not only consistent with, but was required by the language alone of the Act. At the very least, the lower court's construction of the benefit plan provision is the most logical; assuming, *arguendo,* that the Act's language admits of a contrary interpretation, legislative history is the appropriate interpretive vehicle. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 96 S.Ct. 1938 (1976). In the instant case, congressional intent underlying the benefit plan provision is so clearly expressed as to dispel the slightest doubt. Indeed, pains were taken on the floor of both the House and Senate, at the time of deliberation and passage of the Act, to make its meaning clear to employers and employees. On the day the Senate approved the Act, Senator Javits began discussion of the benefit plan provision with the following statement:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the

often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers." 113 CONG. REC. 31254-31255 (November 6, 1967).

Thereupon the following colloquy occurred between Senator Javits and Senator Yarborough:

"The first question, Mr. President, which also was raised with me by our minority leader, the Senator from Illinois [Mr. Dirksen] relates to that section 4(f)(2) of the bill, found at page 20, line 20 to 25. As the Senator from Texas described it, that subsection provides an exemption from the prohibitions of the bill in the case of observance of bona fide seniority systems or employee benefit plans such as a pension, retirement, or insurance plan.

"The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.

"I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. I ask whether he agrees with that interpretation of subsection (2) of section 4(f) of the bill, found on page 20, lines 20 to 25, inclusive.

"Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f), of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." 113 CONG. REC. 31255 (November 6, 1967).

Senator Young concluded the substantive dialogue with a statement which removes any conceivable doubt:

> ". . . The bill provides for the Secretary of Labor to submit annually a report to the Congress covering his activities each year in connection with matters included in this bill. This proposed report must also contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this bill. I am hopeful that if this proposal is enacted into law the Secretary of Labor will make a careful study of the feasibility of continuing the outdated and unjustifiable concept of 65 as an arbitrary age for forced retirement." 113 CONG. REC. 31256 (November 6, 1967).

The balance of Senator Young's remarks, which condemned the practice of mandatory retirement at any age, prove conclusively his understanding that the Act had the effect of eliminating mandatory retirement before the age of 65; and Senator Javits, who was instrumental in drafting the language of the benefit plan provision, and Senator Yarborough, who was the manager of the bill, thanked Senator Young for his contribution. 113 CONG. REC. 31257 (November 6, 1967).[6]

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[6]It is inferable that the reason for the particular care with which the Senators clarified the meaning of the benefit plan provision was that the interpretation urged by the petitioners was initially considered and rejected. In a message dated January 23, 1967 to Congress, President Johnson recommended a law prohibiting age-based employment discrimination and containing an exception ". . . where the employee is separated under a regular retirement system." 113 CONG. REC. 1089-1090 (January 23, 1967); and the Administration bill used the following language:

While the explicitness with which the Senate clarified the meaning of the benefit plan provision could hardly be exceeded, it was at least equalled on the floor of the House in connection with its passage of the bill. The language employed by the various congressmen who addressed themselves to the issue speaks for itself:

> CONG. SMITH: "Since the language of sec. 4(f) is not clear, the language of the report is important. The report states that: 'This exception serves to emphasize the primary purpose of the bill—hiring older workers—by permitting employment without necessarily including such workers in employee benefit plans.'" 113 CONG. REC. 34745 (December 4, 1967).
>
> CONG. DANIELS: "The point should be made, however, that the bill takes into full consideration the problems and interests of employers. It allows for situations in employment where age is a bona fide occupational qualification for a particular job. It also takes account of the problems of employers in the field of pension and other benefit plans. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is

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"It shall not be unlawful for an employer . . . to separate involuntarily an employee under a policy or system. . . ." S. 830, 90th Cong. 1st Sess. §4(f)(2) (1967).

Senator Javits' statement at a committee hearing in connection with an amendment proposed by him to the benefit plan exception included the following remark:

> "The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. . . ." 113 CONG. REC. 7076 (March 16, 1967).

It is clear that the Senator, in his subsequent statements, intended to expressly repudiate any initial approval of the involuntary retirement feature of the Administration's bill.

designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." 113 CONG. REC. 34746 (December 4, 1967).

CONG. DENT: ". . . If someone cannot perform his or her job, the bill provides no relief simply because the individual is between the ages of 40 and 65. It provides relief only when a qualified person who is ready, willing, and able to work is unfairly denied or *deprived* of a job solely on the basis of age." (emphasis added). . . .

"It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers —by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vital to the legislation, and was favorably received by witnesses at the hearings." 113 CONG. REC. at 34747 (December 4, 1967).

CONG. HALPERN: "As clearly stated in this bill, the setting of arbitrary age limits regardless of potential for job performance has become a common practice. Thousands of men and women, not yet ready for retirement, are being elbowed out of productivity by a youth fixation which ignores their skills and capabilities."

. . .

"While nearly half of the states already have anti-age discrimination laws, there are still over a

million Americans over the age of 40 who are out of work. Many thousands of these men and women are not yet ready for voluntary retirement, yet, while they may be at the crest of their skills and capabilities, employers ignore these skills and discard these capabilities." 113 CONG. REC. at 34749 (December 4, 1967).

Congresswoman Dwyer, in her remarks, introduced into the record with no challenge to its accuracy an article in the Prentice-Hall Lawyers Weekly Report which described the bill, in part, as follows:

"However, there would be these *exceptions:*

(1) When age is a bona fide *occupational qualification.*

(2) Companies wouldn't have to take recently hired older workers into their *pension plans.*

(3) *Seniority rules* that apply to newly hired older workers." 113 CONG. REC. at 34752 (December 4, 1967).

The significance of the above-quoted remarks on the floor of both the House and the Senate lies in the fact they are uncontradicted, specific, and harmonious. In *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), the court ignored the legislative history quoted above, choosing instead to undertake a painstaking analysis of earlier testimony presented during committee hearings; while the court's evaluation of that legislative history, in light of the later and more persuasive evidence, was erroneous, the history did reveal the existence of concern with respect to the issue of involuntary retirement before the age of 65.

See also Brief of the Chamber of Commerce of the United States *Amicus Curiae* in which the following statement appears (p. 2):

> "These issues were also of great importance to the Chambers' members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees. . . ."[7]

It is therefore clear that the absence in the various remarks of any hint that approval of involuntary retirement before the age of 65 was intended was not inadvertent.

Accordingly, it is respectfully submitted that the pertinent legislative history is susceptible of no interpretation other than that the employee benefit plan provision was not intended to render lawful involuntary

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[7]The Chamber of Commerce's brief also argues:

> "It has been authoritatively recognized that mandatory retirement provisions in pension plans provide employers flexibility in personnel management to meet special conditions in particular industries, *and also to attract and advance younger employees.*" p. 10 (emphasis added).

Compare Section 2 of the Act, 29 U.S.C. §621(a), (b):

> "The Congress hereby finds and declares that
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, . . .
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . .
>
> . . .
>
> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; . . . ."

retirement, whether with or without a pension, before the age of 65.[8]

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[8]The legislative history of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.*, reflects a congressional policy to allow age discrimination in employee benefit plans only with respect to eligibility to participate and with respect to benefit levels:

> "Under plans which provide defined or specific benefits, it is more expensive for an employer to finance an equivalent retirement benefit for an older employee than for a young employee. *To avoid making it more difficult for older workers to find employment, the bill permits plans which provide defined benefits to exclude from participation employees who begin employment within five years of the normal retirement age.* This, for example, permits a defined benefit plan which provides for a normal retirement age of 65 to exclude an employee who begins work at the age of 60. Such exclusions are not permitted under money purchase pension plans or profit sharing plans. Under these plans, an employee is not promised any specified benefits, but instead is entitled only to the amount that is in his account (employer contributions, forfeitures, and employee contributions, adjustments for earnings, losses, and expenses) with the result that it is no more expensive for the employer to cover older employees than younger employees under such plans." Legislative History of the Employee Retirement Income Security Act of 1976 at 2606.

Thus, the ADEA and ERISA both express concern for the elderly worker and incorporate similar provisions focused upon the economics of benefit plans. Statutes which share similar language and common purposes are to be construed together, *Northcross v. Bd. of Educ. of Memphis City Sebrook,* 412 U.S. 427 (1973), so that a workable and consistent whole is made of the entire system of legislation. *See Safeway Portland Emp. Fed. Credit Union v. F.D.I.C.,* 506 F.2d 1213, 1217 (9th Cir. 1974), particularly in the area of labor law, *see Muniz v. Hoffman,* 422 U.S. 454 (1975); *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Exp. & Stat. Emp. v. Railroad Ret. Bd.,* 239 F.2d 37 (D.C. Cir. 1957). Since all private pension plans are subject to the provisions of ERISA, 29 U.S.C. §1003, it and the ADEA should, it is submitted, be read as an organic whole to determine the extent of congressionally sanctioned age discrimination permitted in private plans; and such discrimination is sanctioned by them only with respect to fringe benefits and not employment *per se*.

III.

Decisions of Lower Federal Courts Inconsistent With That of the Court Below Were Based Upon the Uncritical Acceptance of an Erroneous Interpretive Regulation of the Secretary of Labor or Were the Result of Faulty Analysis.

Section 9 of the Act, 29 U.S.C. §628, empowers the Secretary of Labor to issue appropriate rules and regulations and, in 1969, the following interpretive regulation was promulgated:

> "(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. . . ." 29 C.F.R. §860.110.

That interpretive regulation does not reflect the present thinking of the Secretary, however, as evidenced by the support given to the respondent in the lower court and this Court, and by earlier Labor Department suits raising the same issue. *Brennan v. Taft Broadcasting Co., supra,* 500 F.2d 212 (5th Cir. 1974); *Dunlop v. Hawaiian Telephone Co.,* 415 F.Supp. 330 (D. Hawaii 1976); *Dunlop v. General Telephone Co. of California,* 13 F.E.P. Cases 1210 (D. Cal. 1976).[9]

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[9]In his report to Congress in January of 1976, concerning activities under the Act in 1975, the Secretary stated:

> "[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—i.e., is not in the plan for the sole urpose (sic) of moving out older workers, which purpose has now been made unlawful by the ADEA." U.S. Dept. of Labor, Report covering activities under the Act during 1974 (January 31, 1975).

On February 9, 1976, at a hearing before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor (on H.R. 2588, which would remove the 65-year-old upper limit to the Act's protections), Ronald J. James, Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, stated:

> "A major area of continuing concern is the problem of involuntary retirement prior to age 65. Many pension plans permit the employer—at his option—to force the retirement of any employee who is 55 or over—or in some cases who is 60 or over—without regard to the quality of performance or to any other factor other than age.
>
> "As you are probably aware, it is the Department's position that such forced retirements prior to age 65 are illegal. To allow such retirements, under section 4(f)(2), without a clear economic justification based on the need to preserve the economic integrity of the pension plan—and no economic justification has been advanced—creates a large loophole in the act's protections."

It is believed unnecessary to grapple with the problem of judicial deference to administrative interpretation, *see Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), or the legal signifi-

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The initial interpretation did, however, in at least two cases mislead not only the courts but, apparently, also the parties. In *Steiner v. National League*, 377 F.Supp. 945 (C.D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. October 15, 1975), the court and the parties assumed the validity of the Secretary's interpretive regulation and litigated the issue of the "bona fide" nature of the pension plan. Likewise, in *McKinley v. Bendix Corp.*, 420 F.Supp. 1001 (W.D. Mo. 1976), the court upheld the involuntary retirement of a 55-year-old employee within the context of a dispute, in part, over the meaning of the Secretary's interpretation, as distinguished from its validity. Those two cases are of no relevance because they do not address the issue now before this court.[10]

The three decisions, aside from the instant case, which examined in detail the question of whether the benefit plan provision could ever justify involuntary

cance of an administrative agency's change in position, *see General Electric Co. v. Gilbert*, — U.S. —, 97 S.Ct. 401 (1976). Suffice it to say that while a changed interpretation may not, in certain cases, receive "high marks," legislative history is the test by which the mark is determined. *General Electric Co. v. Gilbert, supra*, — U.S. at —, 97 S.Ct. at 412; *see also Train v. Colorado Public Interest Research Group, supra*, 426 U.S. 1, 96 S.Ct. 1938 (1976).

[10]Another case which is sometimes mentioned in connection with the instant question is *de Lorraine v. MEBA Pension Trust*, 499 F.2d 49 (2nd Cir. 1974). That decision is not even remotely germane; the court merely commented upon the issue and expressly declined to resolve it. 499 F.2d at 51 n. 7. A tangential decision is *Hodgson v. American Hardware Mutual Insurance Co., supra*, 329 F.Supp. 225 (D. Minn. 1971), which approved that aspect of the Secretary's interpretive regulation condemning early retirement of a worker not enrolled in a benefit plan. Although the court did not challenge the portion of the interpretive regulation at issue in the instant case, it did acknowledge that the purpose of the benefit plan provision was to preserve the financial integrity of such plans. 329 F.Supp. at 229.

retirement before the age of 65 make interesting reading. In *Brennan v. Taft Broadcasting Co., supra*, 500 F.2d 212 (5th Cir. 1974), a suit on behalf of an involuntarily retired 60-year-old employee, the Secretary argued that the plan in question was not bona fide because of uncertainty regarding the mandatory retirement age and, further, that the employer was required, under the Act, to consider the retired employee's application for reemployment. The court, while acknowledging the existence of legislative history revealing a purpose to protect ". . . plans which in the absence of the (f)(2) exception would be too costly for the employer to maintain, . . ." 500 F.2d at 216, did not feel such evidence was germane:

> ". . . It is hardly reasonable to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine whether what a statute plainly says is what it really means." 500 F.2d at 217.

To the Secretary's argument that the employee should have been reconsidered for employment under the provision "no such employee benefit plan shall excuse the failure to hire any individual," the court responded:

> ". . . If retired employees must be rehired immediately, the right to insist on compliance with a plan is an illusion. Congress could not have possibly intended, or directed, such a contradictory, irreconcilable result. . . ." 500 F.2d at 218.

The *Taft Broadcasting* court's confusion speaks for itself.[11] It first confused the importance of the "plain

[11]The court also concluded that, by definition, a benefit plan predating the Act could not be a "subterfuge to evade

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meaning" axiom of statutory construction as a vehicle to avoid case by case examinations to ascertain if congressional intent is effectuated, *See Braunstein v. Commissioner,* 374 U.S. 65 (1963), with its diminished interpretive importance when a rule for future guidance in all cases is sought. *See Train v. Colorado Public Interest Research Group, Inc., supra,* 426 U.S. 1, 96 S.Ct. 1938 (1976). Furthermore, because of the proviso "no such employee benefit plan shall excuse the failure to hire *any* individual," the meaning is certainly not clear; and, far from manifesting "conflicting collections of speeches" the legislative history reflects unanimity concerning the meaning of the benefit plan provision. Finally, it is inherently inconsistent to predicate a decision upon the supposed "plain meaning" of one passage of a statutory provision and to find that Congress did not mean what it said with respect to another passage within the same sentence.[12] The court was, however, correct in observing that Congress could not have intended that an involuntarily retired employee

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the purposes of the Act." Compare the House Committee Report accompanying the Act:

> "It is important to note that exception (3) [§4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. . . ." H.R. REP. NO. 850, 90th Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS, 2213 at 2217 (1967).

[12]*See also Dunlop v. General Telephone Co. of California, supra,* 13 F.Ξ.P. Cases 1212 (C.D. Cal. 1976), in which the court agreed with *Taft Broadcasting's* erroneous conclusion that:.

> "The Section (f)(2) exception is clear and unambiguous and legislative history may not be used to override the plain meaning of the statutory exception. . . ." 13 F.E.P. Cases at 1212.

Indeed, the court went even further than *Taft Broadcasting* and observed gratuitously that the Secretary's current interpretation was not even supported by the legislative history upon which he attempted to rely.

could reapply for his job and become surrounded by the protections of the Act; Congress did not intend that any employee under the age of 65 would be subject to involuntary retirement under a benefit plan.

In *Dunlop v. Hawaiian Telephone Co., supra,* 415 F.Supp. 330 (D. Hawaii 1976), another suit instituted in behalf of employees subject to involuntary retirement at the age of 60, the court constructed a novel formulation postulated upon the language: "which is not a subterfuge to evade the purposes of this chapter." Although acknowledging the existence of the legislative history discussed earlier, and despite the fact the plaintiff was the Secretary of Labor, the court based its analysis upon the interpretive regulation which by its terms permitted early involuntary retirement pursuant to a benefit plan. Therefore, reasoned the court, the question presented was what type of plan is a "subterfuge to evade the purposes" of the Act. It concluded that a benefit plan providing for early retirement would be a subterfuge if the retirement were not accompanied by the payment of "substantial benefits." The court overlooked the more obvious meaning, *i.e.,* that a newly hired older worker may not be excluded from fringe benefits pursuant to the literal terms of a plan if the employer would not thereby be required to assume a disproportionately greater economic burden.[13]

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[13]If *Hawaiian Telephone* represented the proper interpretation of the benefit plan provision, a flood of litigation could be expected. In 1970 the average monthly benefit paid under private pension plans in the United States was $138. Kolodrubetz, *Two Decades Of Employee-Benefit Plans, 1950-1970 (A Review),* SOC. SEC. BULL., Vol. 35, No. 4 (April, 1972); *see also* INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, 1971, Comm. on Labor and Public Welfare, Subcomm. on Labor,

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The final decision worthy of notice is *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), which has been the subject of several comments earlier and which therefore requires little discussion here. The essence of the decision is that there is a distinction between discharge and retirement, and that ". . . [w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. . . ."[14] 549 F.2d at 905. The court concluded that because the language of Section 4(a), 29 U.S.C. §623(a), which describes the prohibited employment practices, does not use the specific term "retirement," such a distinction was called for. As stated earlier, that supposition is wrong; the language of that subparagraph, and the language of the Act as a whole, unquestionably embrace retirement as a covered employment practice. *See supra,* n. 1; *cf. Peters*

U.S. Senate, 92nd Cong., 1st Sess. (U.S. Govt. Printing Office, 1972), at 65-66, which found, in a study of 764 private pension plans, a median monthly benefit for normal retirement of $99 per month. While the trend is toward increasing benefit levels, Kolodrubetz, *supra* at 19, the fact that the figures mentioned above are averages illustrates the paucity of benefit levels for substantial numbers of retirees. In the absence of Social Security benefits, many pensioners would, under private pension plans, be reduced to destitution. It is clear, therefore, that the test suggested by *Hawaiian Telephone* would preclude early retirement in many cases, despite the language of a retirement or pension plan, and would spawn numerous suits litigating the question of what constitutes "substantial benefits" in particular cases.

[14]The court fails to mention just who generally regards retirement on an adequate pension with favor. With respect to employees who are healthy, capable, and desire to work, it is suggested that it is management which views early retirement with "an adequate" pension favorably. *See supra,* notes 3 and 13.

Zinger was followed with no comment by the same circuit in *Rogers v. Exxon Research and Engineering Co.,* 550 F.2d 834 (3rd Cir. 1977), which was decided the same day.

v. Missouri Pacific Railroad Co., supra, 483 F.2d 490 (5th Cir. 1973), *cert. denied,* 414 U.S. 1002 (1973). While the court purported to undertake a comprehensive analysis of the legislative history underlying the Act, it disregarded the most persuasive evidence of legislative intent expressed on the floor of Congerss following the committee hearings; indeed, based upon a single recorded sentence uttered by Senator Javits at a committee hearing, it imputed to him an intent which he subsequently expressly disavowed in remarks made at the time the Senate approved the Act. *See supra,* n. 6.

Therefore, it is respectfully submitted that the decision of the lower court is the first correct judicial analysis of the issue now before the Court. Decisions in conflict are characterized by fallacious reasoning, incorrect preconceptions and either a disregard of the appropriate constructional tools or their misapplication.

Conclusion.

While the most reasonable facial interpretation of the benefit plan provision is that involuntary retirement before the age of 65 was never envisioned, the language was apparently capable of breeding confusion, as the conflict among the circuits demonstrates. In an unsuccessful effort to forestall that possibility, Senator Javits, on the floor of the Senate, expressly attempted "to make its meaning clear to both employers and employees." In the House, Congressman Smith observed: "Since the language of sec. 4(f) is not clear, the language of the report is important." The Senator and the Congressman, with contributions from their respective colleagues, thereupon carefully explained that the

purpose of the provision was not to sanction involuntary retirement before the age of 65. Inexplicably, the Secretary of Labor, through an early interpretive regulation, disregarded that unequivocal expression of intention. Succeeding Secretaries, though not rescinding the regulation, repudiated the interpretation and even commenced several suits in behalf of individuals involuntarily retired pursuant to benefit plans. Under the circumstances, the various lower courts which approved early involuntary retirement under such plans were myopic at best. If, as the petitioner states in its petition for a writ of certiorari, "numerous employers face uncertainty as to the validity of their retirement plans," it is an uncertainty which they voluntarily assumed since one may suppose they had the benefit of legal advice. The petitioner's anguish over a supposed judicial surprise "without precedent" cannot be taken seriously. It is respectfully submitted the judgment of the lower court should be affirmed.

CYRIL F. BRICKFIELD, Esq.,
MILLER, SINGER, MICHAELSON,
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Of Counsel:
JONATHAN A. WEISS, Esq.,
Legal Services for the Elderly Poor,
ROBERT B. GILLAN, Esq.,
National Senior Citizens Law Center.

EXHIBIT A.

Consent of Parties Obtained.

UNITED AIRLINES

March 24, 1977

National Retired Teachers Association
The American Association of
Retired Persons

The Gray Panthers

Legal Services for the Elderly Poor

Attention: Robert B. Gillan, Esq.
National Senior Citizens Law Center
1709 W. 8th St., Suite 500
Los Angeles, California 90017

Re: *United Air Lines, Inc. v. Harris S. McMann*
U.S. Supreme Court No. 76-906

Gentlemen:

This will serve as the consent of United Air Lines, Inc. to the filing of a single brief, *amicus curiae,* on behalf of all or some of the addressee organizations, with the United States Supreme Court in the above titled action.

Very truly yours,

/s/ Earl G. Dolan
Earl G. Dolan
Attorney for:
UNITED AIR LINES, INC.

cc: Francis G. McBride, Esq.

HUNZ, McBRIDE & SALIBA, P.C.
Attorneys at Law
Suite 212—The Atrium
277 South Washington Street
Alexandria, Virginia 22314
(703) 836-5888

April 12, 1977

National Retired Teachers Association
The American Association of
Retired Persons

The Gray Panthers

Legal Services for the Elderly Poor

Attention: Robert B. Gillan, Esquire
National Senior Citizens Law Center
1709 W. 8th St., Suite 500
Los Angeles, Ca. 90017

Re: *United Air Lines, Inc. v. Harris S. McMann*
U.S. Supreme Court No. 76-906

Gentlemen:

This will serve as the consent of Harris S. McMann to the filing of a single brief, *amicus curiae,* on behalf of all or some of the addressee organizations, with the United States Supreme Court in the above titled action.

Very truly yours,

HUNZ, McBRIDE & SALIBA, P.C.
/s/ Francis G. McBride
Francis G. McBride

cc: Earl G. Dolan, Esq.

EXHIBIT B.

Retirement—A Medical Philosophy & Approach.

FOREWORD

The AMA Committee on Aging is convinced that a sense of purpose and the opportunity to contribute to the well being of others are as vital to an individual's health as are adequate medical care, nutrition or rest. For this reason, the Committee is deeply concerned with policies which call for arbitrary retirement based on chronological age, without regard to individual desires and capabilities.

This paper summarizes the Committee's convictions as to the negative health effects of such compulsory job separation. It also suggests a medical system for determining physical and mental fitness for continued employment; a system which can be applied periodically over the employee's entire work life.

This paper does not attempt to discuss the social and economic factors which also bear on the question of retirement; it represents simply the medical philosophy of the Committee toward conservation and utilization of our most precious resource—human beings.

/s/ Frederick C. Swartz, M.D.
Frederick C. Swartz, M.D.
Chairman, Committee on Aging

A. Medical Viewpoint

The increase in life expectancy and higher health levels will prove of little benefit to man if he is denied the opportunity to continue contributing of his skills at a certain chronological age, whether this be 45, 65 or 85 years.

It is the conviction of the American Medical Association Committee on Aging that such arbitrary retirement and denial of work opportunity—whether the work is for pay or the pleasure of giving—seriously threatens the health of the individual concerned. By way of emphasis, when we speak of "retirement" in this paper, we mean the complete separation of the man from his job.

Medicine, "the oldest of the professions in the sense that it comprises a group of men who not only share a common training in the relevant sciences and arts, but who also have adopted a code of practice and obligated themselves to perform a service to their fellow men," sees in retirement a direct threat to the health and life expectancy of the persons affected.

Medicine, more than any other discipline, is that knowledge which exists totally for the service of mankind. In the rendering of this service, the basic philosophy has always been to do good, and to do no harm. No matter where we start in the cycle of a generation, the aim of medicine has been to prolong living, to reduce and eliminate suffering, and—above all—to save lives.

The gnarled, runty, deformed child, the acutely and chronically ill, and the handicapped disabled oldster are the highest objects of medical attention, for within these warped receptacles resides that spark of infinity termed life.

The well and healthy are the concern of medicine for the same reason, for there is still much to be done before the race can be perfected. Every effort is made to assist each individual to achieve his maximum potential, to utilize his abilities for his own and the human community's greatest benefit.

From the beginning of life until its end, these objectives and motivations should continue to apply. Unfortunately, however, they apply only until a certain chronological age—most often 65—when forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initative and independence. It narrows physical and mental horizons so much that the patient's final interests and compulsions are in grumbling about his complaints.

This condition has brainwashed thousands into the belief that at 65 one is over the hill. It has imposed the philosophy of the marketplace on the employee—a philosophy that substitutes, at an arbitrary chronological age, the concept "throw out all of the old and defective" for the dictum "to do good and to do no harm."

For these reasons, medicine is compelled to oppose retirement keyed to any chronological age, as detrimental to the best interests of the employee. To do otherwise would be to lose all to those who would gradually lower the age of these so-called retirement criteria until they would be applied at birth. The gnarled, the runty, the defective, like the gnarled, runty apples and oranges, would be graded out in the beginning. This approach might make medicine of the future

more simple, but it would certainly separate the "art" of medicine from the "science."

It is true that persons who have maintained broad interests throughout life and are financially secure could quite conceivably enjoy and benefit from the years following retirement. Insofar as these individuals continue to give of their abilities to others—insofar as their life still has a purpose other than self-gratification—they cannot be called "retired" in any real sense. They have re-directed rather than relinquished their channels for contribution.

The majority of persons, unfortunately, do not fall in this category. Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person

is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms.

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation.

Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family.

Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide.

Vital Statistics of the United States and other sources report that suicides reach a peak in upper age brackets —after retirement normally occurs. The highest inci-

dence of suicide for white males occurs in the age group 70 years and over; for non-white males in the age group 60 and over. There is also a tendency for the person who commits suicide to do so after being isolated from society.

There may also be direct physical sequelae to the abrupt change in activity patterns. The nice nutritional adjustment to work which many individuals develop may be set awry on retirement The person whose physical and mental exercise has been solely or primarily connected with earning a living may exhibit a progressive disuse atrophy following job separation.

Whatever may be the precise percentage adversely affected by retirement, and physicians are convinced it is high, it is ill-advised to create additional problems for people by arbitrarily denying them one of mankind's principal avenues for self-satisfaction. For these reasons, the Committee on Aging decries the practice of retirement by the calendar without regard to individual capabilities or motivation.

B. Suggested Approach

It is the conviction of the Committee that any decision for or against retirement should rest on the same three fundamentals as does a decision for or against hiring:

(1) the individual's desire to work;
(2) the individual's ability to work; and
(3) the employer's need for the skill or ability which the individual offers—or is potentially able to offer.

These fundamental criteria would be applied at the time of employment, would operate over the employee's entire work life with the firm, and could form the

basis for a decision *at any time during this work life* for or against job reassignment, job retraining or job separation—whether in the form of retirement or dismissal.

Many of the reservations expressed about such individualized placement and retirement programs revolve around the second criterion listed above—the individual's ability to continue work—and around the development of methods by which to accurately measure this ability. Accordingly, this paper will attempt to (a) list some of the specific physical and mental characteristics which might be measured in assessing capability for continued work, and (b) suggest a general system for applying such measurements.

It should be re-emphasized that these measurements are not designed to be held "in abeyance" until a certain chronological age, and then applied periodically thereafter, but to be utilized at regular intervals throughout the employee's work life. As such, they may well assist in identifying the individual who should be replaced at 50 as well as one still capable at 90. The individual's physical and emotional status would dictate the frequency of such evaluations, and their results would of course be confidential between employee, employer and physician.

If such an individualized retirement system is to function with optimum effectiveness and benefit to both employee and employer, the firm involved will need to think in terms of hiring and utilizing an employee for his entire work life *potential* rather than just to fill a particular position or slot currently open in the organization. The firm will need to evaluate—and reevaluate—an employee's capabilities not only for the

position currently being filled, but for positions which may become available in the future. Such a personnel policy will be *employee- rather than job-centered,* and will entail greater attention to job analysis, employee training and re-training, and counseling programs within the firm.

Periodic evaluation of the employee's capabilities over his entire work life will be important in providing a base line from which to evaluate physical and mental capabilities at any time he is considered for retirement or job reassignment. Continuous employee counseling, too, will be an integral part of such a system, for a number of reasons. Counseling will be needed because a fluid rather than fixed separation date might otherwise find the worker unprepared emotionally, socially or financially. Individual interpretation may be needed to appropriately prepare the worker when retirement seems desirable. In cases where retirement is indicated, such counseling might delineate the other factors in addition to the individual's capabilities which would influence the decision for or against retirement, and thus help avoid his taking dismissal as a "failure to measure up." On the other hand, counseling may be needed in some instances to persuade an employee to *continue* working, when his own and the company's interests so indicate. Finally, counseling will be important in those cases where continued employment involves an adjustment in work status, pay and prestige for the employee. This may occur because of a decline in the employee's capabilities, or because of a decline in need for the employee's capabilities.

There is no attempt here to imply that the employer owes a greater responsibility to older workers than

he does to those in any other age group. It would obviously be unrealistic, for example, to urge an employer to retain an older worker—no matter how highly proficient—if there were no further possible way of utilizing that worker's contribution or potential contribution. It is assumed, however, that employment and retirement practices would be based on conservation and fullest possible utilization of existing manpower—by selecting, placing, promoting and retraining employees on the basis of qualifications for the job. It is assumed also that employee training, re-training and counseling programs will assist the firm in achieving this objective.

Further, under the type of continuous program proposed in this report, the employee no longer needed in one firm may well secure quick employment in another, on the strength of the data developed on his capabilities and potentials over the years.

C. Medical Evaluation

Basically, evaluation of an individual's capability for a particular job, whether his present position or an alternative available opening, would consist of matching an "Employee Profile" of those physical and mental capabilities susceptible to change over his work life, with a "Job Profile" of the same physical and mental requirements, using identical gradations for comparability. The following section lists some of the specific criteria which might be included in the Employee and the Job Profiles. ***It should be emphasized that this list of criteria is not all-inclusive or exclusive; nor are the gradations specified necessarily the most meaningful.***

*The material is intended only to be suggestive of an over-all system for making such evaluations.**

1) Physical Criteria
   - Strength and endurance .....(S)
   - Mobility—range of motion .....(M)
   - Dexterity .....(D)
   - Coordination .....(C)
   - Vision .....(V)
   - Hearing .....(H)
   - Equilibrium .....(E)

The first four characteristics might be evaluated separately for:

- Forearm and hand .....(F)
- Upper extremities—upper arm, shoulder girdle and back .....(U)
- Lower extremities—feet, legs, pelvic girdle and lower back .....(L)

2) Mental Criteria
   - Concentration .....(C)
   - Analytical ability .....(A)
   - Judgment .....(J)
   - Flexibility .....(F)
   - Initiative .....(I)
   - Ability to work effectively with others .....(P)

A numerical gradation or scale could then be established for each of the above criteria. For example, under (S)—Strength and endurance—a scale of 1 through 4 might be established as follows:

1—Able to perform maximum sustained effort over long periods

*Adapted from the U.S. Army Physical Profile Serial system, (PULHES), used to assess the functional ability of individuals to perform military duties.

2—Able to perform sustained effort over long periods

3—Able to perform sustained effort over moderate periods

4—Unable to perform sustained effort

Similar gradations would be established for other criteria.

Using this system, a "Job Profile" would be established for each position under consideration, and would be reviewed periodically in the light of changing requirements within the firm. Thus, a hypothetical Job Profile of requirements for the position of tool and die maker might look somewhat as follows:

Physical

S (Strength and endurance) ..... (F-2) (U-2) (L-3)

M (Mobility—range of motion) ..... (F-1) (U-1) (L-2)

D (Dexterity) ..... (F-1) (U-1) (L-3)

C (Coordination) ..... (F-1) (U-1) (L-3)

V (Vision) 1

H (Hearing) 3

E (Equilibrium) 1

Mental

C (Concentration) 1

A (Analytical ability) 1

J (Judgment) 3

F (Flexibility) 2

I (Initiative) 3

P (Ability to work effectively with others) 3

A comparable Employee Profile would then be developed and updated periodically thereafter for the individual, through an evaluation of his physical and mental capabilities by his own and the plant physician, combined with a rating by his supervisor and the personnel department on certain aspects of the Profile. Many of the Employee Profile capabilities—mobility, strength and endurance, for example—will require and be directly susceptible to objective medical evaluation; others such as analytical ability, judgment, ability to work effectively with others, etc., may be more amenable to rating by the supervisor or personnel department, or to measurement by testing procedures. The methods for measuring various facets of the Employee Profile will need to be worked out in detail, utilizing accepted testing and evaluation procedures as far as possible.

The methods developed should be generally standardized and accepted between different employers, to permit comparability of results.

Of particular importance in periodic evaluation of the more "intangible" capabilities such as flexibility, judgment, and the like will be a concurrent assessment of employee *motivation*, in order to distinguish between decline in these capabilities, and a decline in *desire to use* these capabilities. This is more than an academic distinction, since it may make the difference between retirement—for cause outside the employee's control—and separation—for cause within the employee's control.

To offset normal variations in employee performance from one day to the next, as well as the fluctuation resulting from increased motivation at the time of testing, it would probably be advisable to evaluate some

of the employee characteristics over a period of time, rather than at a particular point in time. A periodic comparison of Job and Employee Profiles would then provide some quantitative frame of reference from which to consider the individual's suitability for continued employment.

No attempt is made in this report to suggest a minimum rating level below which the employee would be disqualified for continued employment. It would be fallacious to presume that simple comparison of Employee Profile with Job Profile will provide a cut-and-dried answer in itself; additional factors will influence the decision as to what constitutes an acceptable "score" on the Employee-versus-Job Profile.

The physician, in making a recommendation for or against continued employment on the basis of health, will have to consider not only the individual's present physical capabilities for the job in question, but also the presence of currently non-disabling physical or mental disorders which might be exacerbated by job demands. Other factors needing consideration include the individual's potential for training or re-training in alternative job skills, the importance of work as a source of status for the individual, and the extent to which mental health will be fostered by continued employment.

The employer will want to consider not only the physician's recommendation, the demand for skills of the employee under consideration, the firm's investment in the employee, and his current and predicted job performance, but also his potential value to the firm

in future years, in terms of new products or services to be developed.

In the final analysis, it is the Committee's conviction that the decision for or against retirement, just as the decision for or against hiring, should be an individual one, in terms of a specific employee, in a specific firm, at a specific time.